Supreme Court, U.S.
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No. 00-1648

IN THE

Supreme Court of the United States

JON TURNER and NICOLE TURNER,

Petitioners,

v.

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, and CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment permits a former missionary to sue his church in an effort to impose governmental controls on the church's performance of its missionary activities in a foreign country.

RULES 29.6 AND 14.1 STATEMENT

Respondents Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints and Corporation of the President of The Church of Jesus Christ of Latter-day Saints have no parent corporations and issue no stock.

Petitioners are Jon Turner and Nicole Turner.

Respondents are The Church of Jesus Christ of Latter-day Saints, Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints, and Corporation of the President of The Church of Jesus Christ of Latter-day Saints.

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Other Authority:

Centers for Disease Control and Prevention, *The Yellow Book: Guatemala – Yellow Fever Vaccination & Malaria Risk* (visited May 29, 2001) <*http://www.catis.org/cdcfile/yguatema.htm*> 4

Petitioner Jon Turner ("Turner") volunteered to be a missionary for The Church of Jesus Christ of Latter-day Saints ("the Church") and for a time served as a proselytizing Church minister in Guatemala. The Church has tens of thousands of volunteer missionaries serving in hundreds of missions in scores of countries and territories around the world. For psychological or physical reasons, Turner returned home a few months into his two-year mission, at which time he ceased to be a Church minister. He subsequently filed suit against the Church claiming that the Church had failed to adequately train and care for him while in Guatemala, had wrongfully terminated his mission, had wrongfully barred him from entering Church temples, had wrongfully placed certain information in his missionary file, and had not provided him with free medical insurance after his missionary service ended. The Texas trial court and court of appeals rejected such claims because they would entangle the state in the Church's core ecclesiastical affairs. The decision below correctly applies long-established Supreme Court precedent and does not conflict with any decision from the courts of appeals. Accordingly, respondents respectfully request that the petition for a writ of certiorari be denied.

STATEMENT OF THE CASE

A. The Church Administers a World-Wide, Volunteer Missionary Program According to the Dictates of Its Doctrine.

As required by its doctrine, The Church of Jesus Christ of Latter-day Saints is taking the gospel to the furthest reaches of the earth. Pet. App. at A-2. To that end, the Church operates an extensive world-wide missionary program with more than 58,000 missionaries in 331 missions in 115

countries and territories. *Id.* The missionary program is the Church's primary means of transmitting its message to the people of every nation and of bringing new members into its fold. *Id.*

Adult Church members throughout the world who feel the desire to spread the gospel can volunteer to be missionaries. The Church encourages male members between the ages of nineteen and twenty-six to become missionaries for a two-year period. *Id.* To be a missionary, a member must apply to the highest ecclesiastical leaders in the Church after obtaining the recommendation of local Church clergy. *Id.* Applications and recommendations are transmitted to the Church's governing bodies – the Quorum of the Twelve Apostles and the First Presidency – which select the missionaries. *Id.* The President of the Church himself issues the call to those chosen. *Id.* Church missionaries are ministers and, as such, undertake a spiritual commitment to "devote all of [their] time and attention to the Lord, leaving aside all other personal affairs." 4 CR 1163[1]; Pet. App. at A-2.

Before beginning their missions, members who accept the call to serve in foreign countries receive ecclesiastical training and practical instruction for approximately nine weeks at one of the Church's Missionary Training Centers ("MTC"). Pet. App. at A-2; 1 CR 160, 188. Training courses instruct the missionaries in religious principles, the doctrinal lessons they will teach to prospective proselytes, techniques for delivering the Church's message, teaching the gospel in a foreign tongue (where applicable), and the culture of their area of assignment. Pet. App. at A-3. As part of their training,

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1. The reference is to volume 4 of the court record below, page 1163.

missionaries also receive guidance to help them in the rigorous life they are about to lead, including guidance regarding relationships with missionary companions, medical and health care, and developing "a working relationship with their Heavenly Father." *Id.*

Medical and health policies for foreign missions are first considered by the Church's Missionary Medical Advisory Committee, which includes eight physicians. 1 CR. 160, 187-88. The Committee makes recommendations to the Church's Missionary Department which in turn makes its own recommendations to the Church's highest ecclesiastical leaders, who have final say over these and all other missionary issues. *Id.* Health conditions and the quality of medical care for missionaries naturally vary from mission to mission depending on the country and the area of the world.

B. Turner Volunteers to Become a Church Missionary and Serves For a Time in the Guatemala City, Guatemala Mission.

As with all Church missionaries, Turner's decision to serve as a missionary was entirely voluntary. When he reached adulthood, Turner applied to the Church to become a missionary and was interviewed by the bishop of his area as well as the Church's regional president concerning his religious beliefs and spiritual preparedness for missionary service. Pet. App. at A-3. The President of the Church ultimately called him to serve in the Guatemala City, Guatemala mission, and asked that he report to the MTC for training in June 1993. *Id.*

Consistent with missionary policies, Turner passed a physical examination administered by his family doctor and obtained various immunizations at his own expense prior to entering the MTC. 1 CR 194, 199. Turner received literature from the Church indicating that missionaries going to countries at high risk for malaria would receive specific instructions and, where needed, special medication. 4 CR 1166. Turner complains that the Church did not provide him with malaria prophylaxis. Pet. 4, 11. However, the evidence established that the Church provides malaria prophylaxis only to those missionaries serving in areas with a *high risk* of malaria because the medicine has very serious side effects in about forty percent of those who take it, including dizziness, headaches, nausea, skin rashes, diarrhea, and possible visual impairment. Pet. App. at A-6. The central region of Guatemala where Turner was to serve is not considered to be a high-risk area for malaria.[2] *Id.* The court below found there was no "evidence showing the Church

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2. Allegedly, Turner first became ill in an area of Guatemala which he described as located "'in the Highlands region.'" Pet. App. at A-4. According to the Centers for Disease Control and Prevention ("CDC"), there is no risk for malaria in the "central highlands" of Guatemala. *See* Centers for Disease Control and Prevention, *The Yellow Book: Guatemala – Yellow Fever Vaccination & Malaria Risk* (visited May 29, 2001) <*http://www.catis.org/cdcfile/yguatema.htm*>. Nor is there any evidence that Turner's mission was at risk for Hepatitis A. *Cf.* Pet. 3. As regards yellow fever (*see id.*), the literature Turner received from the Church indicated that immunizations for yellow fever would be given to missionaries going to *Africa*, not Central America. 4 CR 116. The CDC does not recommend vaccination for yellow fever for Americans traveling to Guatemala. *See* Centers for Disease Control and Prevention, *The Yellow Book: Guatemala – Yellow Fever Vaccination & Malaria Risk* (visited May 29, 2001) <*http://www.catis.org/cdcfile/yguatema.htm*>.

had given [Turner] any expectation that the living, working, and medical care conditions would be different [in Guatemala] than they were," nor was there "any evidence that the Church had told him the area [where he would minister] was disease or malaria free." Pet. App. at A-27-28.

On August 9, 1993, after nine weeks of preparation in the MTC, Turner traveled from Utah to Guatemala City to begin his official missionary service. Pet. App. at A-4; 1 CR 200-01. Living among and ministering to the poor of Guatemala, Turner's accommodations were indeed spartan. *See* 4 CR 1155.[3] Three months after arriving, Turner complained of feeling ill (fever, headaches, fatigue) and had trouble carrying out his missionary duties. Pet. App. at A-4. Two volunteer medical doctors (themselves Church missionaries) examined him, but were unable to find a cause for his complaints. 1 CR 204-05, 211-14. Turner's mission president sent him to a military hospital in Guatemala City where several physicians (none affiliated with the Church) examined him, but they too were unable to diagnose any physical illness. 1 CR 188-89, 212-13. The physicians became concerned that Turner's problems might actually be emotional or psychological. 1 CR 188-89.

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3. Turner claims that "[t]he Church considered mosquito repellant too expensive to dispense to the missionaries." Pet. 5. To the contrary, the court below found that "[a]lthough the Church did not provide insect repellant in areas where it could be purchased in local stores, the Church did provide an allowance to the missionaries to purchase insect repellant. Turner testified in his deposition that he used insect repellant." Pet. App. at A-6.

C. Turner's Mission Ends Due to Unknown Psychological and/or Physical Infirmities.

Believing Turner could receive more comprehensive treatment in the United States, on January 1, 1994, the Church arranged to fly him back to Utah. Pet. App. at A-5; 1 CR 188. Upon arrival, a Church member took Turner to the Utah Valley Regional Medical Center ("UVRMC"), a hospital in Provo unaffiliated with the Church. Pet. App. at A-5; 1 CR 188. Turner voluntarily signed a consent-to-treatment form and was admitted into the hospital's behavioral medicine unit where several doctors evaluated him for both physical and psychological problems.[4] 1 CR 230. Tests revealed nothing physically abnormal. However, three different doctors from UVRMC independently concluded that Turner exhibited symptoms evidencing a "psychiatric episode" and that he suffered from anxiety, paranoid ideas, and other psychological problems. 1 CR 387, 390, 398. UVRMC released Turner at his father's request on January 6, 1994. 1 CR 215, 218, 239, 241. Turner then returned home to Dallas, Texas, where allegedly he has continued to experience health problems. Pet. App. at A-5 - A-6.

The Church subsequently terminated Turner's status as a missionary, at which time his missionary medical insurance expired. The Church continued to pay Turner's medical bills out of funds from Turner's local Church congregation; the record contains no evidence of any medical bills that the Church refused to pay. 1 CR 162; 5 CR 1478-79. Turner later married petitioner Nicole Turner.

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4. Contrary to petitioners' suggestion (Pet. 6), the lower court determined that the Church "was not involved in the Utah Valley Regional Medical Center's decision to place Turner in the behavior science unit," nor was there any evidence the Church influenced the medical care he received there. Pet. App. at A-39-40.

Turner inaccurately states that "[e]xpert medical testimony established that [he] had malaria" as a result of his missionary experience. Pet. 7. In fact, as the court below found, despite being examined by nearly thirty physicians, "no doctor has been able to clinically diagnose Turner's health problems." Pet. App. at A-6; 1 CR 259-63, 265-68, 276, 280. Turner has never tested positive for malaria or any other mission-related disease. 1 CR 249, 263-375.

D. Petitioners Sue the Church in Texas State Court.

Petitioners sued the Church in Texas state court seeking more than $1 million in actual and punitive damages under a host of different theories – negligence, negligent misrepresentation, breach of fiduciary duty, fraud, defamation, defamation per se, breach of contract, negligent breach of contract, invasion of privacy, false imprisonment, conspiracy to commit false imprisonment, breach of warranties, and intentional infliction of emotional distress. Pet. App. at A-7. The court below found that these causes of action involved three distinct challenges: (1) claims concerning the Church's Missionary Program, including its training program; (2) claims concerning events following Turner's return to the United States; and (3) claims concerning the existence of a confidential or fiduciary relationship between Turner and the Church. *Id.* at A-19 - A-20.

E. Proceedings Below.

After extensive discovery, the Church filed a motion for summary judgment asserting that all of petitioners' causes of action were barred by both the Free Exercise and Establishment Clauses of the First Amendment and that, in

any event, no evidence supported their intentional tort claims. Pet. App. at A-1, A-7 - A-8. The trial court granted the Church's motion and rendered a "take-nothing judgment" against petitioners. *Id.*

On appeal, the Court of Appeals of Texas, Fifth District (Dallas), unanimously affirmed. At the outset, the court held that petitioners had waived their causes of action for negligent misrepresentation, negligent breach of contract, breach of warranties, conspiracy to commit false imprisonment, and defamation per se by failing to argue those claims on appeal. *Id.* at A-8. The court also rejected petitioners' intentional tort claims, *i.e.*, false imprisonment, intentional infliction of emotional distress, and defamation, based on lack of evidence. *Id.* at A-39 - A-47. These claims are not at issue in the instant petition. Pet. 3.

The court next examined petitioners' remaining negligence claims, categorizing them into three groups. First, the court addressed the claims that centered on the Church's "activities of training missionaries and conducting [its] missionary program." Pet. App. at A-20. The trial court had ruled that all such claims were barred by the First Amendment because they attempted to impose government standards and regulations on the operation of the Church's ecclesiastical missionary program. On appeal, petitioners' principal contention was that "the Establishment Clause is at issue only when the government provides aid to a religious institution" and thus was irrelevant here. *Id.* The court below rejected that argument, noting that "government action that hinders a religious institution and unnecessarily entangles the government with the religious institution may also violate the Establishment Clause." *Id.* at A-20 - A-21. The court then held that petitioners' claims

challenging the Church's operation of its missionary program were not cognizable because they would require a court to delve into ecclesiastical doctrines and beliefs, an action prohibited by the Establishment Clause. The court reasoned:

> Essentially, the Turners' claims allege that the Church inadequately trained Turner to be a missionary because it did not disclose [certain information about living conditions, hazards, and health care issues] to him. If the courts address these allegations and find for the Turners, then the courts will be ruling that the curriculum at the missionary training program left Turner unprepared to preach the gospel in Guatemala. If the courts find for the Church, then the courts will be approving the curriculum of the training program and essentially certifying that Turner was prepared to preach the gospel in Guatemala. Either way, the courts' reaching these claims would constitute active government involvement in the religious activity of training missionaries. . . . Likewise, the courts' approval or rejection of the working and living conditions and the level of medical care available in Guatemala [to Church missionaries] would actively involve the government through the courts in the Church's religious activity of operating a mission.

Id. at A-23 - A-24. The court also held that petitioners' claims violated the Free Exercise Clause:

> [T]he Turners' suit seeks government regulation through the courts of the Church's religious activities of training its missionaries and sending

> them to Guatemala to proselytize. Thus, the judicially imposed governmental controls the Turners seek are not religiously neutral, would substantially burden the Church's missionary practice, and are not supported by compelling government interests.

Id. at A-25.

Second, the court addressed petitioners' post-mission claims, which alleged that the Church cancelled Turner's health insurance "'due to the wrongful or premature termination of his mission,'" failed to timely restore his rights to enter Church temples, wrongfully placed certain information in Turner's church-membership file, improperly communicated defamatory information about him to his grandparents, and falsely imprisoned him and inflicted emotional distress upon him by placing him in the mental health unit of UVRMC. *Id.* at A-29 - A-30, A-34. The court found that the defamation, false imprisonment, and intentional infliction claims were not barred by the First Amendment, though (as noted) it dismissed them for lack of evidence. *Id.* at A-34 - A-35, A-39 - A-48. The court found that Turner's remaining claims were essentially challenges to the "internal policies of the Church" and thus violated the First Amendment under cases like *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). Pet. App. at A-31. For instance, regarding Turner's challenge to the revocation of his right to enter Church temples, the court reasoned:

> Regardless of the reason, the decision to revoke [permission to enter Church temples] is an internal matter based on the Church's religious doctrine,

> and the Turners' allegations cannot be determined without an inquiry into and evaluation of the Mormon religion. . . . Such a determination by a court is prohibited under the First Amendment.

Pet. App. at A-32 (quotation marks and citation omitted).

Third, the court addressed petitioners' claims that the Church breached a confidential or fiduciary relationship which existed between Turner and the Church. *Id.* at A-35. The court noted that under Texas law "[d]etermination of the existence of a confidential or fiduciary relationship requires examination of the relationship between the parties." *Id.* The court found that the relevant facts in such an examination would include "either religious doctrine and practices or the internal policies of the Church." *Id.* at A-36. Accordingly, the court held that adjudication of the claim would unconstitutionally entangle the court in ecclesiastical affairs:

> [D]etermination of whether a confidential or fiduciary relationship exists would require the courts to interpret religious doctrine, practices, and the internal policies of the Church. Making such an examination of the relationship between the Church and its missionaries would necessarily involve excessive entanglement by the government with the Church in violation of the Establishment Cause.

Id.

The court below issued its ruling on May 25, 2000. *Id.* at A-1. On February 1, 2001, the Texas Supreme Court denied the petition for review without dissent. *Id.* at A-51.

REASONS FOR DENYING THE PETITION

The petition falls far short of satisfying any of the Court's traditional criteria for granting certiorari. The decision below presents no conflict with any relevant decision of this Court, nor does it conflict with any decision of the courts of appeals. The lower court's ruling does not break any new doctrinal ground; rather, the decision is a fact-bound application of First Amendment principles which this Court and the courts of appeals have repeatedly affirmed for over a century. Review by this Court is therefore unwarranted.

I. The Petition Fails To Demonstrate Any Conflict With This Court's Precedents Or With Relevant Decisions of The Courts of Appeals.

A. In claiming that the decision below conflicts with a decision from this Court, plaintiffs advance a two-step theory. Advocating the same cramped and severely limited view of the Establishment Clause as they did in the lower courts, petitioners first essentially argue that "the Establishment Clause is at issue only when the government provides aid to a religious institution." Pet. App. at A-20.[5]

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5. Petitioners claim they could not "locate any authority ever applying the Establishment Clause to bar a private, common law cause of action for personal injuries or breach of a contract to pay expenses." Pet. 10. In fact, numerous cases hold that common-law tort and contract claims cannot be maintained where to do so would entangle courts in ecclesiastical affairs. *See Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) ("It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect

(Cont'd)

With this erroneous argument as their foundation, petitioners then argue that the decision below conflicts with this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997), because in that case this Court ruled that certain "neutral" government aid could be constitutionally provided to religious entities.[6]

(Cont'd)

leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause."); *Doe v. Evans*, 718 So.2d 286, 294 (Fla. App. 1998) (excessive entanglement prohibition barred action for breach of fiduciary duty), *rev. granted*, 735 So. 2d 1284 (Fla. 1999); *McElroy v. Guilfoyle*, 589 A.2d 1082, 1084 (N.J. Super 1990) (suspended priest's action against diocese for breach of alleged promise to pay priest's legal fees barred by Establishment Clause; "Indeed, such an inquiry into the history and customs of the church in defining the relationships between clergy members would constitute an 'establishment of religion' with a vengeance."); *Roppolo v. Moore*, 644 So.2d 206, 208 (La. App. 1994) (Establishment Clause bars action for clergy malpractice); *Bladen v. First Presbyterian Church*, 857 P.2d 789, 797 (Okla. 1993) (Establishment Clause bars claims against church for negligent hiring and supervision of minister); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 774 (Okla. 1989) (Establishment Clause bars invasion of privacy and intentional infliction of emotional distress claims by parishioner against church arising from actions taken during disciplinary proceedings while she was a member of the church); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 719 (Wis. 1995) (negligent supervision and retention claims rejected on Establishment Clause grounds); *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 203 (Utah 2001) ("[I]t is well settled that civil tort claims against clerics that require the courts to review and interpret church law, policies, or practices in the determination of the claims are barred by the First Amendment under the entanglement doctrine.").

6. In *Agostini*, the Court addressed whether a federally funded program providing supplemental, remedial instruction to disadvantaged children violates the Establishment Clause when the instruction is given

(Cont'd)

The alleged "conflict" here fails on all possible levels. Unlike *Agostini*, the instant case obviously has nothing to do with government aid programs that benefit religiously affiliated schools or religion in general. The context here is totally different, and so too is the relevant precedent. The decision below arises out of an entirely distinct branch of establishment/free exercise jurisprudence which precludes civil courts from violating the institutional autonomy of churches by intruding upon or becoming entangled in essentially ecclesiastical affairs.[7] *See* Pet. App. at A-18, A-

(Cont'd)

by government employees on the premises of parochial schools. *Id.* at 208-13. The Court held that a government program containing appropriate safeguards, such as those present in New York City's Title I program, could provide such aid without violating the separation of church and state. *Id.* at 215-37.

7. *See, e.g., Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 110,115, 117 (1952) (state intrusion into the ecclesiastical affairs of the church "violates [the] rule of separation between church and state" and contravenes "the philosophy of ecclesiastical control of church administration and polity"); *Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U.S. 440, 450-51 (1969) (civil courts may not interfere in "substantive ecclesiastical matters"); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14 (1976) ("'civil courts exercise no jurisdiction'" over "'a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them'"); *id.* at 714-15 ("[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria."); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (National Labor Relations Board barred from inquiring into internal management of religious schools because "[i]t is not only the conclusions that may be reached by the Board [in adjudicating labor

(Cont'd)

20 - A-22. The square holding of *Agostini* is that in certain situations the government may confer benefits upon a religious organization in a neutral manner without violating the Establishment Clause. The square holding of the decision below is that the Establishment Clause does not allow a court through civil tort remedies to interfere with or control the ecclesiastical missionary operations of a church. The two decisions are miles apart – they deal with very different government actions and they focus on very different Establishment Clause concerns. There is simply no conflict here.[8]

B. Petitioners also suggest that the decision below is in direct conflict with two decisions from the courts of appeals: *Sanders v. Casa View Baptist Church*, 134 F.3d 331 (5th Cir. 1998), and *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994).

(Cont'd)

claims] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."); *see also Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929).

8. It is true that the court below briefly mentioned *Agostini* in its general review of recent developments in Establishment Clause law. Pet. App. at A-15 - A-16. Later in the opinion, the court "distinguished" *Agostini*, noting that in contrast to the religiously "neutral statutes approved" there, petitioners here are seeking "judicially imposed governmental controls . . . aimed solely at [the Church's] performance of its religious activities." Pet. App. at A-24. Nevertheless, the court had no need to distinguish *Agostini*. The only relevance to this suit of *Agostini* and the government-aid cases is to underscore that if church-state entanglement is a concern when government aids religious schools, it is doubly problematic where (as here) civil courts are asked to investigate, analyze, and interfere with core ecclesiastical issues – such as how the Church administers its missionary program in the highlands of Guatemala.

Petitioners' reading and representation of these cases are seriously mistaken, both on the facts and on the law.

Sanders involved a suit against a minister and his church for the minister's abuse of a secular marriage counseling relationship. 134 F.3d at 333-34. Noting the jury's factual finding that the minister had held himself out as a secular marriage counselor (*id.* at 337), and that the counseling he had provided was "'essentially secular' in nature" (*id.* at 334), the court rejected the minister's First Amendment defense to plaintiffs' claims of counseling malpractice and breach of fiduciary duty. *Id.* at 338.

Petitioners claim the court also permitted "a claim for breach of fiduciary duty *against . . . [the] church* for [the minister's] alleged misconduct that occurred while the minister was counseling the plaintiff." Pet. 13 (emphasis added); *see also id.* at 14 ("*Sanders* and *Dausch* reinstated negligence claims *against religious groups* because the negligence arose out of counseling relationships that were largely, though not exclusively, secular.") (emphasis added). This assertion is false. While allowing the claims against the minister, the Fifth Circuit expressly *rejected* the plaintiffs' Title VII claims against the church on evidentiary grounds. *Id.* at 338-40. Given the lack of evidence, the court apparently felt no need to reach the First Amendment issues.

Thus, *Sanders* presents absolutely no conflict with the decision below. The Fifth Circuit's holding that the First Amendment does not bar liability against a minister for his abusive conduct during a secular counseling relationship has little or no relevance to whether a church can be held liable for the way it administers its missionary activities in foreign lands. In contrast to what petitioners demand in this case,

the claims the Fifth Circuit allowed against the minister in *Sanders* in no way threatened the institutional autonomy of the religious organization. Here, petitioners are seeking "judicially imposed governmental controls . . . aimed solely at [the Church's] performance of its religious activities." Pet. App. at A-24.

The Seventh Circuit's splintered decision in *Dausch v. Rykse* likewise presents no conflict. In that case, as in *Sanders*, a parishioner brought various state common law and statutory claims against a pastor and his church based on the pastor's alleged abuse of a secular counseling relationship. The district court granted the defendants' motion to dismiss under Rule 12(b)(6) on First Amendment grounds. On appeal, the Seventh Circuit (per curiam with one concurring opinion and one concurring/dissenting opinion) affirmed in part and reversed in part. 52 F.3d at 1429. Regarding the claims against the pastor, the court affirmed the district court's dismissal of the claim for breach of fiduciary duty, finding it to be little more than an "elliptical way of alleging clergy malpractice," a claim universally rejected by the courts as unconstitutional. *Id.* at 1438 (Ripple, J., concurring in part, dissenting in part); *see id.* at 1429 (Coffey, J., concurring) (adopting Judge Ripple's analysis on this issue). But because the pastor was engaged in "professional psychological treatment" (*id.* at 1428) and not religious pastoral counseling, the court held that the First Amendment did not shield the pastor from claims for professional negligence and violation of the state's Sexual Exploitation of Psychotherapy Act. *Id.* at 1429 (per curiam).

However, contrary to petitioners' representation (Pet. 14), the Seventh Circuit "affirm[ed] the district court's dismissal of [the] counts against the church defendants."

52 F.3d at 1429 (per curiam). Petitioners' assertion that "*Dausch* reinstated negligence claims against" the church defendants (Pet. 14) is flatly incorrect.[9] Thus, like *Sanders*, the decision in *Dausch* presents no conflict whatsoever. By dismissing the claims against the church defendants, *Dausch* actually supports the decision below.

Only one federal court of appeals has dealt with the precise issue in this case, and that court's decision is in full harmony with the decision below. In *Dowd v. Society of St. Columbans*, 861 F.2d 761 (1st Cir. 1988), a Roman Catholic priest stationed in Japan as a missionary suffered a permanent disability. He sued for breach of contract based on the purported financial and medical obligations owed by the Society. The trial court granted summary judgment because his grievances, relating to the Society's treatment of him during his missionary service, "constituted religious controversies which were not the proper subject of a civil court inquiry." *Id.* at 763. Undaunted, the priest brought another action alleging various other tort theories. The trial court rejected this second suit as *res judicata*, and the court of appeals affirmed. "[B]oth actions," the First Circuit held,

> involve[d] rules, policies and decisions which should be left to the exclusive jurisdiction of the church and the Society. The Society's own internal guidelines and procedures must be allowed to dictate what its obligations to its

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9. Petitioners' mistake is apparently based on the failure to perceive that Judge Ripple's views in this regard were part of his *dissenting* opinion, not his concurrence. *See id.* at 1435–37 (Ripple, J., concurring in part, dissenting in part) (rejecting district court's holding with respect to church defendants).

> members are without being subject to court intervention.

Id. at 764 (citing *Kedroff*, 344 U.S. at 116).

In short, petitioners can cite to absolutely no decision – in the federal or the state courts – which conflicts with the reasoned decision of the Texas Court of Appeals. That is because the constitutional principles applied in that decision are both long-recognized and uncontroversial. A religious organization must be free to operate its ecclesiastical missionary program as it sees fit, without interference from the government on decisions pertaining to who may serve as a missionary, where that missionary should serve, what conditions the missionary may be subject to while preaching the gospel in underdeveloped countries, when the missionary's services should be terminated, what standing the former missionary should have in the Church after he ceases to serve, and what records or information should be contained in his missionary file for future ecclesiastical reference. All of these decisions go to the heart of missionary work itself, and therefore to the heart of the ecclesiastical operations of this Church's missionary program. The decision below is just another in a long line of cases recognizing this principle.

C. The decision below is also consistent with thirty years of ministerial exception cases in the courts of appeals.[10]

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10. *See, e.g., E.E.O.C. v. Roman Catholic Diocese*, 213 F.3d 795, 800 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000); *Coombs v. Cen. Texas Ann. Conf.*, 173 F.3d 343, 349-50 (5th Cir. 1999); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996); (Cont'd)

The ministerial exception recognizes that "[m]atters touching [the church-clergy] relationship must necessarily be recognized as of prime ecclesiastical concern." *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972). It therefore shields a church's employment decisions in respect to ministers "from the scrutiny of civil authorities so as to preserve the independence of religious institutions in performing their spiritual functions." *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000). "This constitutionally compelled limitation on civil authority ensures that no branch of secular government trespasses on the most spiritually intimate grounds of a religious community's existence." *Id.* at 800.

While a missionary, Turner was a minister of the Church. Pet. App. at A-2. As such, a long line of circuit court decisions holds that the terms and conditions of his service as a minister were ecclesiastical matters "beyond the ken of civil courts." *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 331 (4th Cir. 1997).

In sum, the decision below does not conflict with *Agostini*, *Sanders*, or *Dausch* but rather is consistent with the only court of appeal's decision to directly address the issue and with thirty years of related circuit court jurisprudence. Petitioners' claims of conflict are without merit.

(Cont'd)

Young v. Northern Illinois Conf. Of United Methodist Church, 21 F.3d 184, 185 (7th Cir. 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 (8th Cir. 1991); *Hutchison v. Thomas*, 789 F.2d 392, 393 (6th Cir. 1986); *Rayburn v. Gen'l Conf. of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *see also McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (first articulating ministerial exception).

II. The Decision Below is Correct on the Merits.

Finally, on the merits, there is no reason to disturb the careful and well reasoned decision of the Texas Court of Appeals. Petitioners' apocalyptic rhetoric about the decision below "prohibiting *any* suit that concerns a church's conduct," even should the church "negligently caus[e] an automobile collision" (Pet. 11-12), is vastly overblown. Yet it does highlight the central misconception in petitioners' arguments. To petitioners, this is little more than a routine personal injury case. But as the court below recognized, in reality petitioners' claims are a broadside "aimed solely at a religious institution's performance of its religious activities." Pet. App. at A-24. Try as they might to split up the administration of a missionary program into secular and non-secular components, the simple fact is that here the "Church's actions were necessarily inseparable from the religious activity of its missionary work." *Id.* at A-26. Complicating matters still further, petitioners seek to regulate the Church's missionary program in a foreign country where circumstances are radically different than in the United States.

Far from breaking new ground, the decision below fits comfortably within a long line of Supreme Court decisions that recognize and preserve the autonomy of religious organizations from state interference. Since *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), this Court has consistently protected the ecclesiastical affairs of churches from incursions by civil courts. In *Watson*, the Court held:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to

> create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general associations, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Id. at 728-29.

In the ensuing decades, *Watson* gave rise to the rule of judicial abstention in cases involving challenges to a church's management of its internal affairs. In *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), this Court struck down a New York law that entangled the state in the ecclesiastical affairs of the Russian Orthodox Church. Expressly relying on *Watson*, the Court held that "[l]egislation that regulates church administration, the operation of the churches, [or] the appointment of clergy . . . prohibits the free exercise of religion." *Id.* at 107-08; *see Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960) (extending holding in *Kedroff* to judicial action). Such issues are "strictly a matter of ecclesiastical government," the Court reasoned, and hence no concern of the state. *Kedroff*, 344 U.S. at 115. State intrusion into the ecclesiastical affairs of the church "violates [the] rule of separation between church and state" (*id.* at 110) and contravenes "the philosophy of ecclesiastical control of church administration and polity." *Id.* at 117. The Court expressly reaffirmed the holding in *Watson*:

> The opinion [in *Watson*] radiates . . . a spirit of freedom for religious organizations, an

> independence from secular control or manipulation — in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

Id. at 116.

In *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the Court held that the First Amendment's guarantee of church autonomy "applies with equal force to church disputes over church polity and church administration." *Id.* at 710. Quoting *Watson*, the Court reiterated that under the First Amendment "'civil courts exercise no jurisdiction'" over "'a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.'" *Id.* at 713-14 (quoting *Watson*, 80 U.S. (13 Wall.) at 733-34). Disgruntled ministers or church members, like Turner, cannot invoke the power of civil courts to overturn ecclesiastical decisions:

> Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

Id. at 714-15.

Church autonomy concerns have long dictated that ostensibly neutral statutes and common law doctrines be interpreted so as to avoid incursions into the institutional sovereignty of churches. In *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the National Labor Relations Board attempted to apply neutral principles of labor law to two groups of Catholic high schools. *Id.* at 491-93. Based on the Religion Clauses of the First Amendment, the Supreme Court squarely rejected the attempt. Noting that many of the "challenged actions [of the schools] were mandated by their religious creeds" (*id.* at 502), the Court interpreted the National Labor Relations Act narrowly so as to preclude the Board from interfering with – or even inquiring into – the internal management of the religious schools. *Id.* at 507. The Court reasoned that even the "*process of inquiry* leading to findings and conclusions" may "impinge on rights guaranteed by the Religion Clauses." *Id.* at 502 (emphasis added).

Viewed in the light of this Court's decisions in such cases, as well as their progeny in the lower courts,[11] the decision below was a proper application of a long-established rule of law. How the Church trains, supervises, and cares for its missionaries as they minister to the people of Guatemala is an issue of "church administration" and "ecclesiastical government," *Milivojevich*, 426 U.S. at 710,

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11. *See supra* note 5 (listing cases); *see also Cherepski v. Walker*, 913 S.W.2d 761 (Ark. 1996) (fiduciary duty claim not viable against church); *Bryan R. v. Watchtower*, 738 A.2d 839 (Me. 1999); *Germain v. Pullman Baptist Church*, 980 P.2d 809 (Wa. App. 1999) (negligent supervision theory not viable); *L.L.N. v. Clauder*, 563 N.W.2d 434 (Wisc. 1997) (same); *Schmidt v. Bishop*, 779 F.Supp. 321 (S.D.N.Y. 1991) (no cause of action for clergy malpractice or negligent supervision).

713-14, not a matter to be debated and critiqued by civil judges and juries in tort litigation. Whether certain risks or conditions are acceptable for missionaries carrying the gospel of Jesus Christ to the ends of the earth cannot be determined by civil authorities applying secular standards – only religion can answer such questions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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